No. 86-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRIST THE KING REGIONAL HIGH SCHOOL,

Petitioner,

vs.

EDWARD R. CULVERT, Individually and as Chairman of the New York State Labor Relations Board, JOHN J. FANNING, Individually and as a member of the New York State Labor Relations Board, NEW YORK STATE LABOR RELATIONS BOARD,

—and—

LAY FACULTY ASSOCIATION, LOCAL 1261, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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90-PP

Question Presented

Whether the National Labor Relations Act preempts the New York State Labor Relations Board from asserting jurisdiction over a labor dispute between a Roman Catholic parochial high school operated by a lay board of trustees, and a union representing its lay faculty since, assuming this Court's decision in N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), applies to such a dispute, the reasoning of that case has been undermined by later decisions in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., ____ U.S. ____, 106 S. Ct. 2718 (1986), and other cases, and therefore, the court of appeals' decision that the State Labor Relations Board could exercise jurisdiction herein was incorrect.

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CHRIST THE KING REGIONAL HIGH SCHOOL,

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and

LAY FACULTY ASSOCIATION, LOCAL 1261, American Federation of Teachers, AFL-CIO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATFS COURT OF APPEALS FOR THE SECOND CIRCUIT

Christ the King Regional High School hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1 a, infra), affirming the district court, is reported at 815 F.2d 219 (2d Cir. 1987). The opinion of the district court (App. 15 a, infra) is reported at 644 F. Supp. 1490 (S.D.N.Y. 1986).

JURISDICTION

The opinion and judgment of the Jnited States Court of Appeals for the Second Circuit were issued on March 26, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION STATUTES AND LAWS INVOLVED

United States Constitution, Article VI, Section 2

United States Constitution, First Amendment

National Labor Relations Act, as amended, 29 U.S.C. §151 et. seq.

1968 N.Y. Laws Chapter 890 §4

The relevant portions of the constitutional provisions, statutes and laws involved are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Christ the King Regional High School ("the School"), a Roman Catholic secondary school located in Queens, New York, has an enrollment of approximately 1,800 pupils. The school employs both lay and religious teachers, and teaches both secular and religious subjects.

The School's lay faculty has been represented by the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (hereafter "LFA") since the School became a regional

school in 1976.[1] The last collective bargaining agreement between the School and the LFA expired in 1981. When the Union struck in support of its demands, striking employees were excessed or replaced. Negotiations failed to produce a new agreement.

A. NLRB Proceedings

In August, 1979, the LFA filed two charges with the National Labor Relations Board ("NLRB")[2] alleging the School violated Section 8(a)(1) and (5) of the NLRA by: (1) failing and

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[1]In 1976, the Roman Catholic Diocese of Brooklyn and Petitioner entered into an agreement which conveyed title to the School "so long as the grantee [Petitioner] continued the operation of a Roman Catholic high school upon the premises."

[2]The collective bargaining agreement between the School and the LFA recognized the LFA as the sole collective bargaining representative "pursuant to the National Labor Relations Act."

refusing to provide the LFA with a copy of its pension plan; and (2) unilaterally promulgating a calendar establishing the days of work for the 1979-80 school year. On December 31, 1979 the LFA filed a third charge alleging the School violated Sections 8(a)(1) and (5) of the NLRA by refusing to provide certain information concerning the bargaining unit employees. The Regional Director eventually issued a Consolidated Amended Complaint and Notice of Hearing based on three charges.

On May 26, 1982, the LFA filed a fourth charge with the NLRB alleging the School violated Sections 8(a)(3) and (5) of the NLRA by discharging striking members of the faculty and by refusing to bargain in good faith with the union. On June 24, 1982, the

Regional Director approved withdrawal of this charge.[3]

On August 8, 1983 the Regional Director approved a settlement agreement and revoked the Consolidated Amended Complaint covering the three pending charges which had been filed in 1979. On March 26, 1984 the Regional Director closed the case "conditioned upon the continued compliance with said Settlement Agreement" and "cautioned that subsequent violations of the National Labor Relations Act may become the basis for further proceedings in the instant case despite its formal closing."

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[3]It appears that the withdrawal was prompted by the Union's failure to file the charge within the six month limitations period established by Section 10(b) of the NLRA (29 U.S.C. §160(b)). In an affidavit filed with respondent SLRB, the LFA acknowledged that this NLRB charge was time-barred.

B. SLRB Proceedings

In February 1982, while its earlier charges were still pending before the NLRB, the LFA and striking teachers filed unfair labor practice charges with the New York State Labor Relations Board ("SLRB") alleging that the School had refused to bargain with the LFA and had unlawfully discharged members of the faculty in violation of the New York State Labor Relations Act ("SLRA").[4] The School asserted that the SLRB's exercise of jurisdiction over the School violated the Religion Clauses of the First Amendment or, in the alternative, was preempted by the National Labor Relations Act. The SLRB

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[4]This charge arose out of the same 1981 strike and involved substantially the same allegations as were made in the LFA's charges filed with the NLRB on May 26, 1982.

issued a formal complaint on October 29, 1982 and a notice of hearing for December 17, 1982.

Prior to the hearing, the School again presented its objections to the exercise of jurisdiction by the SLRB. Nevertheless, the SLRB indicated the hearing would commence as scheduled. On December 13, 1982 following the commencement of this action, the School filed a motion with the SLRB to dismiss the agency's complaint or, in the alternative, postpone the SLRB proceedings pending determination by the district court. On January 6, 1983, the School's motion to postpone was granted sine die until the district court issued its decision. However, the SLRB refused to dismiss the complaint.

C. Proceedings in the District Court

On December 10, 1982 the School

filed this action pursuant to 28 U.S.C. §§ 1331, 1337(a), 1343(a)(3) and (4) in the Southern District of New York. The School sought a declaratory judgment and to enjoin the SLRB from proceeding with its administrative hearing. Respondent LFA intervened. On August 9, 1985 the School moved for summary judgment, contending that the SLRB's jurisdiction over petitioner violated both the Free Exercise and Establishment Clauses or, alternatively, that the NLRA preempted action by the SLRB. Both the SLRB and the LFA cross-moved for summary judgment dismissing the complaint.

In addition to disputing the School's First Amendment and preemption claims, the SLRB urged the district court to refrain from entertaining the First Amendment claims on principles of abstention. The SLRB relied on this

Court's recent decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., ____ U.S. ____, 106 S.Ct. 2718 (1986). The district court declined to abstain, finding that the abstention issue had not been "duly presented" at the time of the parties' submissions on the cross-motions. On the merits, the district court found that Catholic High School Association of the Archdiocese of New York v. Culvert, 753 F.2d 1161 (2d Cir. 1985), in which the Second Circuit held that the SLRB could assert jurisdiction over church-affiliated schools, was controlling. It accordingly denied the petitioner's motion, granted the respondents' cross-motions and dismissed the complaint. The School appealed.

D. Court of Appeals And Later SLRB Proceedings.

Relying primarily on this Court's

decision in N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Second Circuit affirmed the district court's judgment that the NLRA does not preempt the SLRB from exercising jurisdiction over church-affiliated schools. However, unlike the district court, the court of appeals refused to reach the merits of the Religion Clauses issues. It held that the district court should have abstained from deciding the First Amendment claims on the authority of Ohio Civil Rights Commission v. Dayton Christian Schools, supra.[5]

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[5]The court of appeals concluded that: (1) there was an ongoing state proceeding; (2) an important state interest was involved; and (3) the petitioner would be able to raise its constitutional claims in a state court proceeding on review of any adverse SLRB determination. Accordingly, it did not reach the School's First Amendment contentions.

There is a conflict in the circuits

(Footnote Continued)

Shortly before the court of appeals announced its decision, the SLRB resumed the unfair labor practice proceedings which had been stayed pending the determination of the district court action.[6]

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION SHOULD BE REVIEWED IN ORDER TO RESOLVE THE APPARENT CONFLICT BETWEEN DAYTON CHRISTIAN AND CATHOLIC BISHOP.

The Second Circuit rejected Petitioner's argument that the subject

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(Footnote Continued)
over the First Amendment questions. Compare Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112 (7th Cir. 1977), affirmed on other grounds, 440 U.S. 490 (1979) (NLRB jurisdiction) and Catholic High School Ass'n v. Culvert, supra (SLRB jurisdiction).

[6]The School continues to assert before the SLRB, inter alia, that its First Amendment protections are abridged by the unfair labor practice proceedings.

matter of this dispute was preempted by the NLRA (App. 9 a, infra). It reasoned that here, as in Catholic Bishop, teachers in church-operated schools would not be found to be within the jurisdiction of the NLRA, given the perceived risk of First Amendment infringement resulting from an exercise of jurisdiction and the absence of clear Congressional intent to cover them. It therefore concluded that "states are not preempted from regulating teachers in these schools," and permitted the SLRB to assert jurisdiction.[7]

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[7]The court of appeals also rejected the School's argument that the jurisdictional exclusion of Catholic Bishop applied only to teachers in church-operated schools, rather than to the schools themselves, relying on NLRB v. Bishop Ford Central High School, 623

(Footnote Continued)

Such reliance appears to have been misplaced. In light of Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra, especially, Catholic Bishop is no longer valid. This Court should grant certiorari to resolve the preemption issue and determine that the NLRA encompasses labor disputes between lay teachers in church-operated schools and their employers.[8]

(Footnote Continued)
F.2d 818, 819-20 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981), and Catholic High School Association v. Culvert, supra.

[8]In Bishop Ford, supra, the court of appeals held that the expression, "church-operated," as used in Catholic Bishop was intended merely "as a convenient method of characterizing schools with a religious mission," rather than as a restriction to institutions directly controlled by a religious body or official. 623 F.2d at 823. The NLRB has recently acceded to the court of appeals' view. Nazareth Regional High School, 283 NLRB No. 116,
(Footnote Continued)

A. Catholic Bishop Has Been Undermined By Dayton Christian And Other Cases.

1. The Rationale of Catholic Bishop.

This Court held in Catholic Bishop that teachers in church-operated schools who teach both religious and secular subjects are not within the jurisdiction granted by the NLRA. 440 U.S. at 491, 506-07. The Court reasoned that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a

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(Footnote Continued)
125 LRRM 1033 (April 29, 1987); Jewish Day School of Greater Washington, Inc., 283 NLRB No. 106, 125 LRRM 1058 (April 29, 1987).

For purposes of this discussion, we shall assume, arguendo, that Christ the King is "church-operated" within the meaning of Catholic Bishop, although it is operated by a lay board of trustees.

manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." Id. at 507.[9]

In concluding that a significant risk of First Amendment infringement existed, the Court stated:

> The resolution of [unfair labor practice charges] by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy - administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusion.

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[9]Four Justices dissented. They found no basis for implying such a jurisdictional exclusion. In their view, there was no escaping the First Amendment issues. Id. at 508-518.

440 U.S. at 502 (emphasis added; footnote omitted). It is doubtful that this reasoning survives today.

2. The Abnegation of Catholic Bishop by Dayton Christian.

In Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra, involving a state agency fair employment practice hearing, the Court apparently repudiated its earlier reasoning in Catholic Bishop, writing:

> Dayton contends that the mere exercise of jurisdiction over it by the State administrative body vitiates its First Amendment rights. But we have repeatedly rejected the argument that a constitutional attack on State procedures themselves "automatically violates the adequacy of those procedures for purposes of the Younger - Huffman line of cases." [Moore v. Sims, 442 U.S. 415, at 427, n.10 (1979), referring to Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).] Even religious schools cannot claim to be wholly free from some state regulation. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). We therefore think that however Dayton's constitutional claim should be decided on

> the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious - based reason was in fact the reason for the discharge.

106 S. Ct. at 2724 (emphasis added).[10]

Four Justices concurred in the judgment. In an opinion authored by Justice Stevens, they concluded that the case was not ripe for review, since there had been no finding of liability and no remedy had been imposed on the employer. They agreed with the district court and the majority "that neither the investigation nor the conduct of a hearing on those charges

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[10]The majority opinion cited Catholic Bishop only for the proposition that even if an administrative agency could not consider the constitutionality of its own statute, it could construe its own statutory mandate in light of federal constitutional principles. Id. at 2724.

is prohibited by the First Amendment...." Id. at 2725 (emphasis added). They, too, rejected the premise of Catholic Bishop and of the court of appeals in Dayton Christian that the mere exercise of jurisdiction by the government agency would result in the "chilling knowledge" that the School's selection criteria for teachers "will be reevaluated, and, perhaps, adjusted by the State applying secular criteria," thus placing an impermissible burden on the schools' religious freedoms. Id. at 2725.[11] Rather, the

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[11]Furthermore, they also viewed as unpersuasive the notion that

> Looking into the future, ... the "highly intrusive nature" of back-pay and reinstatement, as well as the "continuing surveillance imposed by the conciliation agreement proposed by the Commission" and rejected by the School, "reveal the significant risk that the First Amendment will be

(Footnote Continued)

concurring Justices found that "any challenge to a possibly intrusive remedy is premature at this juncture," Id. at 2726, since, as the majority also noted, "the Commission recognizes religious justification for conduct that might otherwise be illegal." Id.[12]

(Footnote Continued)
infringed." [Dayton Christian Schools, Inc., v. Ohio Civil Rights Commission, 766 F.2d 932, 942-43 (6th Cir. 1985)] (quoting NLRB v. Catholic Bishop of Chicago [supra, id., at 502]). Accord, 766 F.2d, at 951.

Id. at 2725.

[12]In addition, the concurring Justices noted, because a coercive order against Dayton Christian would not be rendered until after a hearing,

> It therefore follows that the Commission's finding of probable cause and decision to schedule a hearing in this case does not also mean that the commission intends to impose any sanction, let alone a sanction in derogation of the First Amendment's Religion Clauses.

Id. (emphasis in original).

Similarly, here, the fact that the NLRB would investigate a parochial high school's alleged violations of a labor-management relations act would not impinge upon the First Amendment. Under the Court's rationale, the investigation and hearing themselves could not reasonably implicate the concerns of the Religion Clauses. Should a genuine Constitutional issue arise as a result of a particular sanction which the agency imposes, it may be addressed with the benefit of a complete record and an actual order. It thus appears that the reasoning in Catholic Bishop cannot be reconciled with the Court's decision in Dayton Christian.

3. The Limited Inquiry Into Religious Belief.

The concern that the NLRB would have to become enmeshed in argument over "the good faith of clergy - administrators and its relationship to

the school's religious mission," Catholic Bishop, supra, id. at 502, likewise is premature and speculative. There may be no issue as the sincerity of a particular belief.[13]

Even if there is such a dispute, however, decisions subsequent to Catholic Bishop make clear that deprivation of NLRA jurisdiction would not be warranted. Under Dayton Christian and other cases, the religious institution's ability to decide religious issues without government intrusion is protected. See Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie, supra, 107 S.Ct. at 1051. Once evidence of an

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[13] Cf. Hobbie v. Unemployment Appeals Comm'n of Fla., ____ U.S. ____, 107 S.Ct. 1046, 1047-48 and n.2 (1987) ("It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held.").

honest religious motivation is adduced, the agency's religious inquiry ends.[14]

Accordingly, the spectre of "difficult and sensitive" First Amendment questions arising out of the alleged

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[14]Such evidence may also provide an affirmative defense to an unfair labor practice charge of discriminatory discharge. See N.L.R.B. v. Transportation Management Corp., 462 U.S. 396 (1983). The Second Circuit in Catholic High School Association, supra, relied on Transportation Management to find no First Amendment conflict in the SLRB's assertion of jurisdiction there. 753 F.2d at 1169. However, the court of appeals misread this Court's decision. It contended that Transportation Management required the agency to show that "the teacher would not have been discharged 'but for' the unlawful motivation." Id. That is precisely the view which the Supreme Court rejected. 462 U.S. at 400-01. Under the Transportation Management decision, even if protected activity was a motivating factor in the employee's discharge, the employer may escape an unfair labor practice finding "by proving by a preponderance of the evidence that the discharge rested in the employee's unprotected conduct as well and that the employee would have lost his job in any event." Id. at 400.

discriminatory discharge of a teacher in a church-operated school is too speculative and remote to justify a blanket denial of NLRA jurisdiction.

As shown below, the same conclusion pertain to the refusal to bargain issue, as well.

B. Dayton Christian Suggests That NLRB Jurisdiction With Respect To An Employer's Bargaining Duty Poses No Unavoidable Risk Of Entanglement.

The degree of surveillance which results from a duty to bargain in good faith, it has been held, does not raise an "imminent possibility" that an employer such as Christ the King would have to bargain with lay teachers on religious subjects.[15] See Catholic

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[15]The collective bargaining agreement between the School and the LFA specified that it could not interfere with the "canonical, ecclesiastical or religious" functions and duties of the (Footnote Continued)

High School Association v. Culvert, supra, 753 F.2d at 1166. In this view, NLRB jurisdiction does not inevitably require comprehensive, discriminating and continuing state surveillance, id. at 1167, quoting Lemon v. Kurtzman, 403 U.S. 602, at 619 (1971); Meek v. Pittenger, 421 U.S. 349 at 370 (1975); Wolman v. Walter, 433 U.S. 229, at 254 (1977), since the employer's good faith is put in issue only if a charge is filed. Id. Also, the unfair labor practices are entirely secular. Investigation of the charges (including any hearing) are limited to secular allegations, Board orders are not self-enforcing and the employer may challenge

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(Footnote Continued)
School. The agreement further excluded these matters from the grievance and arbitration mechanism and established a special appeals process through a designated religious official.

the agency's order on review. Id.[16] Furthermore, the government's power is limited: it can only direct the employer to return to the bargaining table and bargain over mandatory, secular subjects. Id.[17]

Accordingly, recent caselaw suggests that no immediate danger of entanglement need attend an assertion of NLRB jurisdiction over a religiously affiliated secondary school. See Dayton Christian, supra, at 2725.

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[16]The School continues to assert its constitutional objections before the SLRB. Of course, it also reserves its right to raise these objections in any federal proceedings should they ensue from a preemption finding.

[17]See Universidad Central De Bayamon v. N.L.R.B., 793 F.2d 383, 388-89 (1st Cir. 1985)(per Coffin, C.J., panel opinion, adopted by that portion of a divided Court en banc supporting NLRB jurisdiction over a religiously affiliated university), denying enforcement to 273 N.L.R.B. 1110 (1984).

C. The Consequences of Dayton Christian For NLRB Preemption.

The decision in Dayton Christian supports NLRA preemption here. It removes as an obstacle the paramount concern of the Court in Catholic Bishop: the supposedly imminent danger of First Amendment infringement resulting from an NLRB investigation and hearing -- "the very process of inquiry". According to Dayton Christian, no Religion Clauses guarantee is abridged by that process. And, as the concurring opinion emphasizes, any real controversy can be addressed when it arises or at the conclusion of the administrative proceedings. Therefore, any general objection to NLRA jurisdiction evaporates.

The decision in Catholic Bishop was not based on any clear statutory language or even legislative history dealing with church-operated schools.

Rather, it was based on a judicial construction made decades after the statute was enacted, with a view toward avoiding what was feared to be a thorny Constitutional thicket. The altered accommodation between religious liberty and Government regulation compels reconsideration of the decision in Catholic Bishop.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT DAYTON CHRISTIAN ABSTENTION IS INAPPLICABLE WHERE NLRB PREEMPTION EXISTS

The Second Circuit acknowledged that under its decisions the abstention doctrine is not usually applied in cases involving preemption claims (App. 11a, infra). However, the court reasoned that the policy of non-abstention was inapplicable here because it rejected petitioner's preemption argument. Accordingly, if this Court grants certiorari on the issue of NLRA

preemption, it should also review the abstention issue to assure a complete disposition of the case.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue, and the judgment and opinion of the United States Court of Appeals for the Second Circuit should be reviewed by this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 787—August Term, 1986

(Argued: February 2, 1987 Decided: March 26, 1987)

Docket No. 86-7947

CHRIST THE KING REGIONAL HIGH SCHOOL,
Plaintiff-Appellant.

— v. —

EDWARD R. CULVERT, individually and as Chairman of the New York State Labor Relations Board, JOHN J. FANNING, individually and as a member of the New York State Labor Relations Board, NEW YORK STATE LABOR RELATIONS BOARD, an agency of the Department of Labor of the State of New York,
Defendants-Appellees.

LAY FACULTY ASSOCIATION, LOCAL 1261, American Federation of Teachers, AFL-CIO,
Defendant-Intervenor.

Before:

PIERCE, ALTIMARI, *Circuit Judges*, and
STEWART, *Senior District Judge*.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge*, dismissing plaintiff's complaint on the merits pursuant to a motion for summary judgment.

Dismissal affirmed on different grounds.

ROGER S. KAPLAN, Esq., New York, N.Y. (Thomas P. Schnitzler, Philip B. Rosen, Jackson, Lewis, Schnitzler & Krupman, New York, N.Y., of Counsel), for the *Plaintiff-Appellant*.

EVELYN TENENBAUM, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Lawrence S. Kahn, Deputy Solicitor General, New York, N.Y., of Counsel), for the *Defendants-Appellees*.

*Honorable Charles E. Stewart, Jr., Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

PIERCE, *Circuit Judge*:

Christ the King Regional High School ("the School") appeals from an order of summary judgment in favor of the New York State Labor Relations Board, et al. ("SLRB" and "the SLRB defendants"), and the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO ("LFA" or "the Union"). The district court dismissed the School's complaint which sought to enjoin the SLRB from asserting jurisdiction over a labor dispute at the School.

The School argues that exercise of jurisdiction by the SLRB would violate the first amendment of the United States Constitution, and, alternatively, that the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1982), preempts the SLRB from exercising jurisdiction. The SLRB defendants assert that an exercise of jurisdiction by it would not violate the first amendment, that the NLRA does not preempt SLRB jurisdiction, and that the district court should have abstained from determining the issues on the merits.

We hold that the NLRA does not preempt the SLRB from exercising jurisdiction over the labor dispute at the School and that the district court should have abstained from determining the first amendment issues on the merits.

BACKGROUND

The facts herein are not in dispute.

Christ the King Regional High School is a secondary school affiliated with the Roman Catholic Church; it is located in Queens County. The School has an enrollment of approximately 1800 pupils and the curriculum includes

both secular and religious subjects. In addition to the religiously affiliated staff, the School employs a lay faculty who comprise nearly ninety percent of the teachers employed by the school. With the exception of lay teachers employed to teach religious subjects, lay faculty are employed by the School without regard to their religious beliefs.

The lay faculty has been represented by the LFA since the School became regional in 1976.[1] Since that time, the LFA has negotiated three separate contracts with Christ the King. The last collective bargaining agreement between the School and the Union expired in 1981. At the beginning of the 1981-1982 school year, the teachers went on strike. The striking teachers were discharged and have not since worked for the School.

Between August 1979 and May 1982, the LFA filed four unfair labor practice charges against the School with the National Labor Relations Board ("NLRB"). The charges alleged that the School had violated: (1) § 8(a)(1) and (5) of the NLRA, by failing to provide the Union with a copy of its pension plan; (2) § 8(a)(1) and (5) of the NLRA, by unilaterally promulgating a calendar year establishing the days of work for the 1979-1980 school year; (3) § 8(a)(1) and (5) of the NLRA by failing to provide to the Union a list of the names, addresses, salaries, and wages of bargaining unit employees; and (4) § 8(a)(3) and (5) of the NLRA, by terminating striking teachers and refusing to bargain with the Union. The first three charges were settled, and the last charge was withdrawn. On March 26, 1984, the Regional Director of the NLRB closed the case

[1]In 1976, the Roman Catholic Diocese of Brooklyn agreed with the School to convey title to the property to the School "so long as the grantee continued the operation of a Roman Catholic High School upon the premises."

"conditioned upon continued compliance with said Settlement Agreement" and "cautioned that subsequent violations of the National Labor Relations Act may become the basis for further proceedings in the instant case despite its formal closing."

In early 1982, the LFA filed an unfair labor practice charge with the SLRB, alleging that the School violated the New York State Labor Relations Act, N.Y. Lab. Law § 701 *et seq.* (McKinney 1977) ("SLRA"), by refusing to bargain with, and discharging striking members of, the LFA. In addition to the LFA, 73 teachers who were discharged each filed individual charges with the SLRB, alleging substantially the same violations that the LFA raised.

In February 1982, the SLRB commenced an informal investigation of the unfair labor practice charges filed by the LFA. As part of the investigation, the LFA and School convened at a conference before the SLRB on February 23, 1982, to state their positions regarding the unfair labor practice charges. At the conference, the School stated its objection to the assertion of jurisdiction by the SLRB over the dispute. The School urged that an exercise of jurisdiction over the School by the SLRB would violate the Establishment and Free Exercise Clauses of the Constitution, and alternatively, that jurisdiction by the SLRB was preempted by the NLRA. Thereafter, on March 12, 1982, the School filed a memorandum formally stating its opposition to SLRB jurisdiction over the labor dispute at the School, to which the LFA filed an answering memorandum. After considering the arguments and memoranda, the SLRB concluded that it was not precluded from exercising jurisdiction over the labor dispute at the School and that LFA's unfair labor practice charges con-

stituted a *prima facie* case. Therefore, on October 29, 1982, the SLRB issued and served an unfair labor practice complaint on the School with a notice scheduling a pre-hearing conference on the charges for December 7, 1982, and a hearing on December 17, 1982.

On December 1, 1982, the School moved before the SLRB to dismiss its complaint based on preemption grounds. At the pre-hearing conference, the School renewed its objections to SLRB jurisdiction; and, after the conference, moved to adjourn the December 17, 1982 hearing. On December 10, 1982, the School commenced this action in the United States District Court for the Southern District of New York against the SLRB, its chairman and a member. Thereafter, by order dated January 6, 1983, the SLRB denied the School's motion before it to dismiss the complaint and postponed the hearing "*sine die* until such time as the United States District Court for the Southern District of New York issues its decision in the action."

In the district court, the School moved for summary judgment pursuant to Rule 56; the LFA intervened and joined the SLRB defendants in their filing of a cross-motion for summary judgment. The district court denied the School's motion, granted the SLRB defendants' and LFA's cross-motion, and dismissed the complaint. Although the SLRB defendants raised the issue of abstention in their answer as well as in a letter submitted to the court prior to the disposition of the case,[2] the district court declined to abstain and dealt with the issues on the

[2]Appellees pursued the abstention defense by letter submission on July 31, 1986 to alert the court to a recently decided Supreme Court case, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986). See DISCUSSION II, *infra*. However, the abstention defense had been previously raised by appellees in Paragraph 27 of their answer.

merits. On the merits, the district court determined that the first amendment and preemption issues raised by the School were "identical" to those raised in *Catholic High School Association of the Archdiocese of New York v. Culvert*, 753 F.2d 1161 (2d Cir. 1985), and therein found not to preclude SLRB jurisdiction over a church-affiliated school. Therefore, the district court dismissed the School's complaint.

On appeal, the School reasserts its first amendment and preemption arguments and further asserts that the district court acted properly in not abstaining from deciding the case on the merits. The SLRB defendants assert that the NLRA does not preempt SLRB jurisdiction over the labor dispute at Christ the King and that the district court should have abstained from dealing with the first amendment issues. We agree and affirm the dismissal of the complaint by the district court, however, we do so on the grounds set forth below.

DISCUSSION

I. *Preemption*

Appellant urges that because "Congress intended to and did vest in the [NLRB] the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause," the NLRA preempts the SLRA. *See NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (emphasis in original). Implicit in appellant's argument is the notion that the NLRA is all-pervasive and leaves no room for state legislation in labor law. We decline to adopt this reasoning. Indeed, it is clear that if the NLRA does not exert jurisdiction in a given area, the states can supplement the NLRA with state legislation. *See Allen-Bradley Local No. 1111 v. Wisconsin Employ-*

ment Relations Board, 315 U.S. 740, 746-50 (1942). In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979), the Supreme Court stated that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the [NLRB]," such teachers are not within the jurisdiction of the NLRB. Since the Supreme Court has held that the NLRA does not cover teachers in church-operated schools, we conclude that states are not pre-empted from regulating teachers in these schools.

The SLRA was originally enacted in 1937 and § 715 specifically excluded "employees of charitable, educational, or religious associations or corporations" from coverage under the SLRA. 1937 N.Y. Laws, Ch. 433. However, since 1937, § 715 has been amended several times, most recently to delete any reference to the exclusion of employees of charitable, educational and religious organizations from coverage under the SLRA. 1968 N.Y. Laws, Ch. 890. Governor Rockefeller, approving the amendment, stated that "the bill recognizes that it is no longer appropriate to distinguish between categories of employers with regard to the protection of these essential rights." McKinney's 1968 Session Laws, p. 2389. Thus, SLRB jurisdiction in this matter is authorized pursuant to a state statute.

We reject appellant's argument that *Catholic Bishop of Chicago* applies only to *teachers* at church-operated schools and that the *schools* themselves are subject to NLRB jurisdiction. In *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 819-20 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), we specifically held that the NLRB does not have jurisdiction over church-operated schools. Moreover, in *Catholic High*

School Association, we noted that the NLRA does not preempt the SLRB from exercising jurisdiction over church-affiliated schools. 753 F.2d at 1165 n.2. Indeed, "[t]he touchstone of the preemption doctrine is conflict, actual or potential, between two systems which regulate labor activity." C.J. Morris, The Developing Labor Law 1509 (2d ed. 1983). Here, the state is exercising jurisdiction in an area where the NLRB has no jurisdiction. Hence, since there is no conflict, no real preemption problem exists.

Appellant argues that the NLRB has exercised jurisdiction over the School even after *Catholic Bishop of Chicago* was decided. Prior to filing unfair labor practice charges with the SLRB, the Union filed four unfair labor practice charges before the NLRB. The NLRB investigated the charges and approved the withdrawal of one and the settlement of the others. We reject appellant's contention that these voluntary assertions of jurisdiction by the NLRB necessarily indicate that the NLRA preempts SLRB jurisdiction in this case. *Catholic Bishop of Chicago* and *Bishop Ford* support the conclusion that the NLRB does not have jurisdiction over church-affiliated schools and their lay faculties. An improper exercise of NLRB jurisdiction over a labor dispute between these parties does not preempt the proper exercise of jurisdiction by the SLRB. In the final analysis, it is for the courts, not the NLRB, to determine what Congress intended the scope of NLRB jurisdiction to be.

Accordingly, we affirm the judgment of the district court that the NLRA does not preempt the SLRB from exercising jurisdiction over church-affiliated schools.

II. *Abstention*

Having decided that the exercise of SLRB jurisdiction in this matter would not be preempted by the NLRA, we

now address whether the district court should have abstained from determining the first amendment claims on the merits. As a threshold matter, we find that the issue of abstention was before the district court.

The district court declined to abstain from determining the first amendment issues on the merits because it found that the abstention issue had not been "duly presented." The district court acknowledged that abstention was raised in the SLRB defendants' answer and in a letter to Judge Broderick regarding *Ohio Civil Rights Commission v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986), but decided that the abstention issue was not properly before it because the claim was not raised in the moving papers or "urged in the argument with respect to these motions." We disagree with this determination and hold that the abstention issue was properly before the district court.[3]

In their answer to the School's complaint in the district court, the SLRB defendants' raised abstention as an affirmative defense. The abstention argument was again urged before the district court in a letter to Judge Broderick before he decided the cross-motions for summary judgment. It is not surprising that the SLRB defendants did not address their abstention defense in their cross-motion for summary judgment, and we certainly do not believe that this resulted in a waiver of the already-pleaded defense. The notice of cross-motion was dated October

[3]We note that in *Dayton* it was urged that the state defendants waived their abstention claim by stipulating to the district court's jurisdiction. The Supreme Court rejected this argument, holding that an abstention claim is not waived unless the "State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits." 106 S. Ct. at 2722. In view of appellees' letter submission to Judge Broderick urging the district court to abstain from deciding the case on the merits, it cannot be said that appellees waived their abstention claim.

22, 1985, only nine months after *Catholic High School Association* was decided, yet eight months before *Dayton Christian Schools* was decided. Therefore, at the time the motion papers were submitted, the SLRB defendants understandably asserted the argument that, under the authority of *Catholic High School Association*, SLRB jurisdiction over the labor dispute at the School did not violate the first amendment. In January, 1986, when the motions were argued, *Dayton Christian Schools* had not yet been decided; so again, for SLRB to pursue the first amendment arguments on the merits was understandable. After *Dayton Christian Schools* was decided in June 1986, the SLRB defendants expeditiously sent a letter to Judge Broderick contending that his disposition of their cross-motion was governed by this Supreme Court decision. We conclude that the abstention issue was properly before the district court.

We next address whether the district court should have abstained from deciding the first amendment issues.[4] In *Dayton Christian Schools*, based on principles of federalism and comity, the Supreme Court held that a federal court should not enjoin a pending state administrative proceeding when important state interests are involved, as long as the federal plaintiff will have a full and fair opportunity to litigate constitutional claims during or

[4]We have held that the abstention doctrine is not usually applied in a case involving a preemption claim. *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 326 n.2 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983); *Marshall v. Chase Manhattan Bank (N. A.)*, 558 F.2d 680, 683-84 (2d Cir. 1977). The underlying rationale of this doctrine is that it would be futile to abstain in deference to a state decisional body if it later should develop that it may not have jurisdiction over a dispute due to the preemptive jurisdiction of a federal body. Since we already have determined that the SLRA is not preempted by the NLRA in this area, this policy is not applicable here. Therefore, we need not avoid the abstention claim in this case.

after the proceedings. 106 S. Ct. at 2723.[5] The Court applied this principle to preclude a federal court from reviewing first amendment issues arising from the Ohio Civil Rights Commission's ("Commission") review of a sex discrimination claim brought against Dayton Christian Schools, Inc., a private elementary and secondary school requiring teachers to be born-again Christians. The school had refused to renew the employment contract of Ms. Linda Hoskinson, a pregnant teacher who was told that the school's religious doctrine required that mothers stay home with pre-school children. Ms. Hoskinson sought the advice of an attorney who urged the school to renew Hoskinson's contract to prevent litigation. The school rescinded its nonrenewal decision but terminated Hoskinson because she violated the school's internal dispute resolution process by resorting to action leading to civil suit rather than settling the dispute through the "biblical chain of command."

After her termination, Ms. Hoskinson filed a complaint with the Commission, alleging sex discrimination. The Commission initiated administrative proceedings against the school and issued a complaint. The school's answer asserted that the first amendment prevented the Commission from exercising jurisdiction over the school. During the pendency of the administrative proceedings, the

[5]The abstention doctrine enunciated in *Dayton Christian Schools* is derived from *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. In *Younger*, the Court held that a federal court should not enjoin a pending state criminal proceeding unless necessary to prevent immediate irreparable injury. After *Younger*, this principle was extended to civil proceedings in which important state interests are involved. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Most recently, the *Younger* doctrine has been extended to pending state administrative proceedings as long as there is the potential for state court review of the federal litigant's constitutional claims. *Dayton Christian Schools*, 106 S. Ct. at 2723; *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432-34 (1982).

school sought an injunction in federal district court in the Southern District of Ohio. The district court refused to issue the injunction, holding that the Commission's proposed action would not violate the first amendment. 578 F. Supp. 1004 (1984). The court of appeals reversed, holding that the first amendment would be violated. 766 F.2d 932 (6th Cir. 1985).

On appeal by the Commission, the Supreme Court held that since the elimination of sex discrimination is an important state interest and the school would have an adequate opportunity to raise its constitutional claims before the Commission or in a subsequent state court action, the district court should have abstained from exercising jurisdiction to enjoin the Commission from investigating the claim. 106 S. Ct. at 2723. The Court also rejected the school's claim that the mere exercise of jurisdiction by the Commission over the school would violate the first amendment. *Id.* at 2724.

Applying *Dayton Christian Schools*, we must resolve three questions to determine if abstention is the proper approach in this case: (1) whether there is an ongoing state proceeding; (2) whether an important state interest is involved; and (3) whether the federal plaintiff has an adequate opportunity for judicial review of his constitutional claims during or after the proceeding. As in *Dayton Christian Schools*, the administrative agency in this case has not yet conducted its formal hearing or imposed any sanctions; hence, an ongoing state proceeding exists. Since we already have held that a state has a compelling interest in regulating the duty to bargain collectively, *see Catholic High School Association*, 753 F.2d at 1171, we find that an important state interest exists in this case. Finally, the School was able to raise its constitutional claims in a con-

ference before the SLRB and in a memorandum to the SLRB in opposition to SLRB jurisdiction. Further, the constitutional issues involved in this case may be decided in an Article 78 proceeding pursuant to the New York Civil Practice Rules and Laws. *See, e.g., Temple Israel of Lawrence, Inc. v. New York State Labor Relations Board,* N.Y.L.J., Aug. 21, 1984, at 6, col. 5 (Sup. Ct., New York County Aug. 9, 1984). Moreover, the SLRB cannot enforce its own orders. Consequently, the School will have an opportunity to present its constitutional claims before the New York Supreme Court if the SLRB petitions for enforcement of its order, or if the School seeks review of an SLRB order. *See* N.Y. Lab. Law § 707 (McKinney 1977). Accordingly, we hold that the doctrine of abstention should have been applied in this case, precluding a determination of the first amendment issues on the merits.

For the reasons stated above, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRIST THE KING REGIONAL HIGH SCHOOL, Plaintiff, -against- EDWARD R. CULVERT, individually and as Chairman of the NEW YORK STATE LABOR RELATIONS BOARD, and JOHN J. FANNING, individually and as a member of the NEW YORK STATE LABOR RELATIONS BOARD, an agency of the Department of Labor of the State of New York, Defendants, and LAY FACULTY ASSOCIATION, LOCAL 1261, American Federation of Teachers, AFL-CIO. Intervenor.	82 Civ. 8233 (VLB)

VINCENT L. BRODERICK, U.S.D.J.

Plaintiff Christ the King Regional High School ("Christ the King" or "the School") has moved for summary judgment pursuant to F. R. Civ. P. 56, seeking a declaratory judgment that defendant New

York State Labor Relations Board ("SLRB")[1] cannot assert jurisdiction over the School and the lay teachers it employs, and a permanent injunction prohibiting the SLRB from asserting such jurisdiction.

Defendant SLRB has cross-moved for summary judgment on the basis that the application of the New York State Labor Relations Act ("SLRA" or "the Act") to lay teachers in parochial schools violates neither the Free Exercise nor the Establishment Clauses of the First Amendment, and that the SLRB is not preempted by the National Labor Relations Act ("NLRA") from exercising jurisdiction over church-operated schools. The defendant-intervenor, the Lay Faculty Association, Local 1261 ("Association") has joined in the defendant's cross-motion.

For the reasons that follow, I deny plaintiff's motion, grant defendant's cross-motion, and dismiss the complaint.

I.

Since this case has been submitted, the Supreme Court opinion has been rendered in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 106 S. Ct. 2718 (1986).

In that case, Dayton Christian Schools, Inc. ("Dayton"), an elementary and secondary school which had been formed by two churches, sought to enjoin, on Free Exercise and Establishment Clause grounds, a pending state administrative proceeding against it.

Each member of Dayton's staff was required to be a born-again Christian and to subscribe to various religious tenets. A teacher who had duly subscribed to those tenets was terminated,

and filed a complaint with the state Civil Rights Commission, alleging sex discrimination. The Commission determined that there was probable cause to believe that the teacher was discriminated against on the basis of her sex. It initiated formal administrative proceedings when the school failed to respond, either by acquiescence or by counter-proposal, to a proposed conciliation agreement and consent order.

Dayton then sought, in federal court, "a permanent injunction of the state proceedings on the ground that any investigation of Dayton's hiring process or any imposition of sanctions for Dayton's nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment." Id. at 2722. The Commission moved to dismiss, urging abstention but also defending its action on the merits.

The district court refused to issue an injunction, "on grounds that any conflict between the First Amendment and the administrative proceedings was not yet ripe, and that in any case the proposed action of the Commission violated neither the Free Exercise nor the Establishment Clause of the First and Fourteenth Amendments." Id. at 2720. The Sixth Circuit reversed. It held that "the exercise of jurisdiction and the enforcement of the statute would impermissibly burden appellees' rights under the Free Exercise Clause and would result in excessive entanglement under the Establishment Clause." Id.

The Supreme Court reversed, "holding that the District Court should have abstained under our cases beginning with Younger v. Harris, 401 U.S. 37 (1971)." Id.

On the authority of Dayton Christian Schools, Inc. I should therefore abstain from deciding the First Amendment issues, if a request for such abstention has been duly presented.

While abstention is adverted to in SLRB's answer, it has not been urged in the argument with respect to these motions, except in a post-submission letter reference to the Dayton Christian Schools, Inc. case. I shall, therefore, deal with the motions on the merits.

II.

Christ the King, a school affiliated with the Roman Catholic Church,[2] is located in Middle Village, Queens. It has an enrollment of approximately 1800 students. The school employs both religious and lay teachers, and both secular and religious subjects are taught there.

Plaintiff stresses Christ the King's religious orientation: its students are required to take four years of religion and to attend mass; crucifixes and other religious symbols are displayed in classrooms and in hallways; the school has a full-time spiritual director available to students; there is a chapel on the premises where mass is conducted daily; and the school's "Spiritual Director and other members of the faculty (both lay and religious) encourage students and faculty during homeroom to communicate with God by completing a 'working contract'".

Defendant-intervenor Association contests the so-called "religious mission" of the school. It insists that no effort is made to require teachers of religion to conform to Catholic doctrine; that the school does not require

students to attend mass; and that students are not encouraged to complete so-called "working contracts." Lay teachers were hired without regard to their religion, according to the Association, and a number of non-Catholic lay teachers worked at the school for many years. The Association notes that during the 1980-81 academic year, the last in which members of the Association were at the school, all but one of the members of the Board of Trustees were laymen and there were some 105 lay teachers, as against only four teachers who were members of religious communities. The Association asserts that the school continues to employ lay teachers without regard to religion.

Seventy-three lay teachers, represented by the Association, filed individual unfair labor practice charges against the school with the SLRB on

February 18, 1982. They alleged that the school had unlawfully refused to bargain with the Association and had unlawfully discharged members of the school's faculty in violation of the SLRA.

The SLRB issued a formal complaint against the school on October 29, 1982, alleging that the school had violated the SLRA. Specifically, the complaint alleged that "[s]ince on or before September 3, 1981, [the school] ha[d] failed and refused, and continues to fail and refuse, to meet, confer, discuss and negotiate in good faith with the Association for the purposes of collective bargaining . . . ." If further alleged that the school discharged 60 lay employees and refused to reinstate them because they engaged in concerted activities for collective bargaining purposes.[3]

On December 1, 1982 the school moved before the SLRB for an order dismissing the complaint on the basis that the National Labor Relations Board ("NLRB") had exclusive jurisdiction over the school. This action was commenced on December 10, 1982.[4] The SLRB denied the motion to dismiss on January 6, 1983. At the same time, however, the SLRB granted plaintiff's motion to postpone the SLRB proceedings until I issued a decision in this action.

Between 1979 and 1982, the Association had filed four unfair labor practice charges against the plaintiff with the NLRB. None of these charges involved any religious issues,[5] and all were either settled or withdrawn. On December 17, 1982 the Association filed a petition with the NLRB seeking an advisory opinion as to whether plaintiff, because of its religious charac-

ter, would be exempt from the jurisdiction of the NLRB. The NLRB refused to issue an advisory opinion and dismissed the petition.[6]

III.

Plaintiff contends that the SLRB's assertion of jurisdiction over plaintiff violates the Free Exercise and Establishment Clauses of the First Amendment to the Constitution, and that even if there is no constitutional bar the National Labor Relations Act ("NLRA") preempts the SLRB from asserting jurisdiction.

Plaintiff argues that I must reach the First Amendment issues that are raised because amendments to the SLRA provide for SLRB jurisdiction over employees of church-operated schools. It urges that the SLRA and the NLRA are fundamentally similar, and that I should follow the Supreme Court's reas-

oning on the constitutional issues as raised in NLRA cases.

Invoking a three-tier analysis employed by the Supreme Court to resolve Free Exercise Clause questions, plaintiff argues: (1) that the nature and extent to which the SLRB's assertion of jurisdiction burdens the free exercise of the plaintiff's religious beliefs is clear; (2) that the state cannot justify the burden which the assertion of jurisdiction by the SLRB will place on the religious liberty of plaintiff; and (3) that accommodation by the state to plaintiff's Free Exercise concerns would not unduly interfere with the governmental interest of maintaining labor peace through the furtherance of collective bargaining.

Plaintiff invokes another three-tier analysis employed by the Supreme Court in contending that the SLRB

assertion of jurisdiction violates the Establishment Clause. Plaintiff concedes (1) that the SLRA has a secular purpose and (2) that its primary purpose is not to advance or to inhibit religion, but it vigorously asserts (3) that the SLRA fosters an excessive entanglement of government with religion. Specifically, the school maintains that the activity being burdened is pervasively religious, and that the SLRB's ongoing supervision would inevitably focus on areas where religious and secular elements are inextricably intertwined.

Plaintiff's alternative position, assuming I find that there is no constitutional bar to the SLRB's assertion of jurisdiction, is that the NLRB retains a preemptive jurisdiction over church-operated schools.

Defendant SLRB asserts that the SLRA is concerned only with the secular issue of anti-union conduct, and that neither the SLRA's requirements nor the practices of the SLRB result in excessive entanglement between church and state. It claims further that the procedural safeguards included in the SLRA would completely protect plaintiff's First Amendment rights, and that the SLRB's activities with respect to lay teachers in parochial schools threaten no more entanglement than do other statutes which regulate employees in religious institutions.

The SLRB contends that application of the SLRA to relations between plaintiff and the Association will not violate the Free Exercise Clause. It further contends that its procedures and practices ensure that the SLRA will never place more than a minimal burden

on religion and will not require plaintiff to take any action inconsistent with its religious beliefs. Defendant SLRB argues that the State has a particular compelling rationale for applying the good faith bargaining requirement to lay teachers at Catholic schools; in the fall of 1984 there were 370,833 students and 28,203 teachers in Catholic elementary and secondary schools in New York State. The creation of an exemption for church-affiliated schools would, according to defendant SLRB, seriously undermine the state's interests.

Defendant SLRB asserts that it is not preempted by the NLRA from exercising jurisdiction over lay teachers at church-operated schools.

Defendant-intervenor Association, in its submissions, joins in the arguments of defendant SLRB.

IV.

The threshold question which I address is the extent to which the Second Circuit's decision in Catholic High School Association of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985) is dispositive of the motions currently before me.

In Catholic High School Ass'n, the Second Circuit cast the issue as whether "the Religion Clauses of the First Amendment made applicable to the states by the Fourteenth Amendment prohibit the New York State Labor Relations Board from exercising jurisdiction over the labor relations between parochial schools and their lay teachers." 753 F.2d at 1163. It recognized the issue as one of first impression in the Second Circuit, and one expressly unresolved by the Supreme Court in NLRB

v. Catholic Bishop, 440 U.S. 490, 507 (1979).[7]

The New York State Labor Relations Act, which as originally enacted in 1937 did not apply to employees of religious or educational organizations, was amended in 1968 to bring these employees within its scope. One year later, the lay teachers' union petitioned the SLRB for certification as the exclusive bargaining representative of the teachers in the 11 "church-operated" schools managed by the Catholic High School Association. After a series of collective bargaining agreements governing the terms and conditions of lay teachers' employment, the union in 1980 filed various unfair labor practice charges against the Catholic High School Association. See 753 F.2d at 1163-64. None of the charges raised religious issues.

After investigating the merits of the union's case, the SLRB issued a formal complaint. The Catholic High School Association then brought suit seeking a declaratory judgment and injunctive relief against the SLRB. It challenged the SLRB's assertion of jurisdiction, positing constitutional and preemption arguments analogous to those made by Christ the King in the instant case. It moved for summary judgment and the SLRB cross-moved. The district court found no preemption by the NLRA, but granted plaintiff Catholic High School Association's motion, concluding that the SLRB's assertion of jurisdiction violated the Establishment Clause. See 573 F. Supp. 1550 (S.D.N.Y. 1983)(Lasker, J.). Judge Lasker enjoined the SLRB from continuing its proceedings against the Catholic High School Association.

The Second Circuit, which found that there was a justifiable controversy presented, reversed and remanded with directions to enter summary judgment in favor of the SLRB, permitting it to exercise jurisdiction over the plaintiff. The Court of Appeals affirmed Judge Lasker's finding that there was no preemption by the National Labor Relations Act: the SLRB validly asserted jurisdiction "because Congress did not indicate that the NLRB had jurisdiction." 753 F.2d at 1165 n.2. The Second Circuit made reference to "the familiar three-pronged" test which the Supreme Court often found useful in determining whether there have been violations of the Establishment Clause, entailing inquiry into "'[1] [W]hether the challenged law or conduct has a secular purpose, [2] whether its principal or primary effect is to advance

or inhibit religion, and [3] whether it creates an excessive entanglement of government with religion.'" Id. at 1166 citing Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

Because the parties did not dispute that the SLRA has a secular purpose and that its primary effect is not to advance or inhibit religion, the Second Circuit confined its Establishment Clause inquiry to whether the Act violated the Clause "because if threatened to produce an excessive administrative entanglement of government with religion." Catholic High School Ass'n, 753 F.2d at 1166.

Judge Lasker had found the threat of such entanglement on two grounds: he found an "imminent possibility" that the schools would have to bargain with lay teachers on religious subjects; and he found that in the event of an al-

leged unlawful discharge, the SLRB would have to determine whether any religious reason offered as an explanation of the discharge was a valid aspect of church doctrine.

The Second Circuit disagreed. With respect to the degree of entanglement that results from the duty to bargain over secular terms and conditions of employment, the Second Circuit concluded that "the duty to bargain does not involve excessive administrative entanglement between church and state." Id. at 1168. The district court "misapprehended the degree of supervision that the duty to bargain entails, and the nature of the state intrusion into the bargaining process." Id. at 1166. The Court of Appeals stated that the SLRB's supervision over the collective bargaining process is neither "comprehensive nor continuing" as it would

have to be to necessitate a finding of entanglement, nor is it intrusive: the SLRB does not initiate unfair labor practice proceedings and an employer's good faith is put in issue only if a union or individual files a charge; the various unfair labor practices specified in the SLRA are completely secular; an SLRB labor relations examiner has to limit his investigation to those issues that relate directly to the practices set forth in charges; and an order of the SLRB is not self-enforcing, and a "church-operated" school may refuse to comply and raise First Amendment defenses. 753 F.2d at 1167.

With respect to inquiry into the reasons for unlawful discharges, the Court of Appeals conceded that the First Amendment "prohibits the [SLRB] from inquiring into an asserted religious motive to determine whether it is

pretextual," but found that this limitation does not preclude the SLRB from asserting jurisdiction. Id. at 1168. The SLRB would "still [be] free to determine, using a dual motive analysis, whether the religious motive was in fact the cause of the discharge." Id.

The Second Circuit also concluded that the Free Exercise Clause did not bar the SLRB from asserting jurisdiction over labor relations between the Catholic High School Association and the union. It balanced "the burden the state imposes on the [plaintiff's] exercise of its religious beliefs ... against the State's interests in enforcing the Act." Id. at 1169. In this balancing it considered whether the claims presented were religious or secular; whether the "State action burdened the religious exercise"; and

whether "the State interest was sufficiently compelling to override the constitutional right of free exercise of religion." Id. Ultimately it determined that "the constitutionality of the [SLRB's] assertion of jurisdiction must only be considered with respect to its direct effect on religious beliefs. To find that an enactment violates the right to free exercise of religious beliefs, 'it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.'" Id. at 1170, quoting School District v. Schempp, 374 U.S. 203, 223 (1963). The Court of Appeals also considered whether a finding of SLRB jurisdiction might "impermissibly chill free exercise rights", and concluded that it would not. The "indirect and incidental burden on religion" caused by

the assertion of jurisdiction over employees of religious organizations was justified "by the State's compelling interest in collective bargaining." Id. at 1171.

The issues in Catholic High School Association, are identical to the issues before me. Its holding directly governs the instant case.

V.

Plaintiff urges this court to revisit the question posed in Catholic High School Ass'n and to reject the Second Circuit's decision on the grounds that (1) the Second Circuit misapprehended a basic premise of collective bargaining, (2) it did not have the benefit of Aguilar v. Felton, 105 S.Ct. 3232 (1985), and (3) in any event this court should consider the question of the exercise of jurisdiction over religious employers in light of the

conflict between the circuits on this question. These arguments are not persuasive.

Plaintiff attempts to distinguish Catholic High School Ass'n as a precedent binding upon me on the ground that the Second Circuit rendered its decision in that case prior to, and hence without the benefit of the guidance of, the opinion in Aguilar v. Felton, 105 S.Ct. 3232 (1985), in which the Supreme Court reaffirmed the objectives of the Establishment Clause. This argument is without merit.

In Aguilar, the Supreme Court reviewed, and affirmed, the Second Circuit's ruling (Felton v. Secretary, United States Department of Education, 739 F.2d 48 (2d Cir. 1984)) that the Establishment Clause was violated when the City of New York used federal funds to pay the salaries of public employees

who taught in parochial schools. It is therefore disingenuous to argue that the Second Circuit did not have the benefit of Aguilar. While the Supreme Court's rationale in affirming was obviously not available to the Second Circuit, the Supreme Court specifically endorsed much of the Second Circuit's reasoning. See, e.g., Aguilar, 105 S.Ct. at 3238.

Plaintiff urges inconsistencies between the Second Circuit's decisions in Felton and Catholic High School Ass'n. I decline plaintiff's invitation to assess or resolve these alleged inconsistencies. Resolving them in the manner suggested by plaintiff would require me effectively to reverse the Second Circuit's ruling on the constitutional issues ruled upon by it in Catholic High School Ass'n.

A federal district court is bound by the rule of the circuit in which it is located, see Ore & Chemical Corp. v. Stinnes Interoil, Inc., 606 F. Supp. 1510, 1512 (S.D.N.Y. 1985) (citations omitted), and the rule of the Second Circuit on the question before me governs. See Rodriguez v. Coastal Ship Corp., 210 F. Supp. 38, 40 (S.D.N.Y. 1962). The decisions of one circuit's court of appeals are not binding in another circuit. Newsweek, Inc. v. U.S. Postal Service, 663 F.2d 1186, 1196 (2d Cir. 1981), cert. den. 457 U.S. 1133 (1982). "[D]espite any criticism that another court of appeals may have directed at the result or teaching of [a case decided by the Second Circuit], this court is bound to follow that case." Truck Drivers Local Union No. 671 v. United Parcel Service, 526 F. Supp. 1044, 1049-50 (D. Conn. 1981)

aff'd 697 F.2d 298 (2d Cir. 1982). As Judge Blumenfeld has aptly said, "[t]he fact that contrary views have been expressed by Courts of Appeals for other circuits would not authorize me to reject the reasoning of my own Circuit Court of Appeals." Southern New England Distributing Corp. v. Berkeley Finance Corp., 30 F.R.D. 43, 49 (D. Conn. 1962). A "district court cannot shape decisional law by overruling precedent, since it lacks the power to do so, but instead merely applies the law as it finds it." Kennard v. UPS, Inc., 531 F. Supp. 1139, 1142 (E.D. Mich. 1982). Thus, I may not choose to follow the precedent set forth by some other circuit court of appeals which conflicts with a direct ruling by the Second Circuit, nor may I assess the Second Circuit's understanding of collective bargaining.

These principles mandate that I apply the Second Circuit's decision in Catholic High School Ass'n. In that decision the Second Circuit has specifically ruled on the preemption issue, and on the issue of the exercise of jurisdiction by the SLRB over relationships between lay teacher employees and church-operated or church-related schools. On the authority of that decision, I find that there is no preemption by the National Labor Relations Act, and that the First Amendment does not prohibit the SLRB from exercising jurisdiction over the labor relations between Christ the King and the Association.

SO ORDERED.

VINCENT L. BRODERICK, U.S.D.J.

Dated: New York, New York
September 30, 1986

1. Although plaintiff has also brought suit against Messrs. Culvert and Fanning individually and in their capacities as chairman and member of the New York State Labor Relations Board respectively, I shall treat the SLRB as the primary defendant for the purposes of this motion.

2. In 1976, the Roman Catholic Diocese of Brooklyn entered into an agreement with Christ the King, conveying title to the land where Christ the King is located to plaintiff so long as the plaintiff continued to operate a Roman Catholic high school on the premises.

3. The complaint issued by the SLRB encompassed all of the charges filed by the Association except for 13 charges which were withdrawn because the 13 individual teachers involved showed no interest in pursuing them.

4. Plaintiff in this action seeks to enjoin the SLRB from proceeding with its administrative hearing to determine whether the school unlawfully discharged members of its faculty in violation of the SLRA. On February 16, 1983 the SLRB filed its answer herein, and on March 7, 1983 the Association intervened.

5. The charges alleged that the school had (1) refused to provide the Association with a copy of its pension plan, (2) promulgated a calendar establishing the days of work for the 1979-80 school year without consulting the Association, (3) failed to provide a list of the names, addresses and salaries of the members of the bargaining unit to the Association, and (4) re-

fused to negotiate with the Association.

6. The Board stated:

> [T]he Board's advisory opinion proceedings are designed primarily to determine questions as to the applicability of the Board's discretionary jurisdictional standards to an employer's "commerce" operations. The entire submission by the parties herein basically raises the issue whether the Employer, because of its religious character, is exempt from the Board's jurisdiction under the rule of N.L.R.B. v. The Catholic Bishop of Chicago, supra. This issue does not fall within the intendment of the Board's advisory opinion rules. We shall, therefore dismiss the petition herein.

266 NLRB 738 (1983)(footnotes omitted).

7. In Catholic Bishop, the Supreme Court deemed the issue to be a "difficult and sensitive" question. 440 U.S. at 507.

CONSTITUTIONAL PROVISIONS

Section 2 of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the United States Constitution provides

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

NATIONAL LABOR RELATIONS ACT

The relevant portions of the National Labor Relations Act, as amended, 29 U.S.C. §151 et. seq. are as follows:

Section 151. Findings and Declaration of Policy

* * * *

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 152 Definitions

* * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic

service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

Section 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this

subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

NEW YORK STATE LABOR RELATIONS ACT

In 1968, the New York State Legislature amended the New York State Labor Relations Act by removing from Section 715 of the N.Y. Labor Law an exemption for "employees of any charitable educational religious association or corporation." 1968 N.Y. Laws Chapter 890 provided:

> §4. Section seven hundred fifteen of such law, as amended by chapter six hundred eighty-five of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:
>
> §715. Application of article
>
> The provisions of this article shall not apply to: (1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act; or (2) employees of the state or of any political or civil subdivision or other agency thereof; ~~or (3) employees of any charitable, educational or religious association or corporation, no part of the net earnings of which inures to the benefit of any private shareholder or individual, except~~

that the provisions of this article shall apply to: (a) employees of a building owned or operated by such an association or corporation and used or occupied as a commercial or industrial enterprise operated for the production of profit, irrespective of the purposes to which such profit may be applied, and which employees are not engaged in the charitable, educational or religious activities of such association or corporation; (b) employees of any such charitable, educational or religious association or corporation whose services are performed in connection with a hotel or restaurant owned or operated by such charitable, educational or religious association or corporation, except members of a religious order or volunteers; and (c) employees of a non-profitmaking hospital or residential care center.